1996

# Travis Olsen v. Intermountain Health Care, a Utah corporation doing business as Primary Children's Meidcal Center : Reply Brief

Utah Court of Appeals


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Charles P. Sampson, H. Michael Drake; Suitter Axland and Hanson.

IN THE UTAH COURT OF APPEALS

| | | |
|---|---|---|
| **TRAVIS OLSEN,** | ) | |
| | ) | |
| Plaintiff and Appellant, | ) | Case No. 960558-CA |
| | ) | |
| -vs- | ) | |
| | ) | |
| **INTERMOUNTAIN HEALTH CARE,** | ) | |
| a Utah corporation doing business | ) | |
| as **PRIMARY CHILDREN'S** | ) | |
| **MEDICAL CENTER,** | ) | Priority No. 15 |
| | ) | |
| Defendant and Appellee. | ) | |

**REPLY BRIEF OF APPELLANT TRAVIS OLSEN**

**APPEAL OF A SUMMARY JUDGMENT OF**
**THE THIRD DISTRICT COURT, SALT LAKE COUNTY, UTAH**
**THE HONORABLE LESLIE A. LEWIS PRESIDING**

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## ARGUMENTS

### POINT I

### THE GENERAL RULE THAT AN EXPERT IS NEEDED DOES NOT APPLY TO THIS CASE OF MEDICAL MALPRACTICE

Rule 702 of the Utah Rules of Evidence provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness as qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.

Travis Olsen does not dispute that, as a general rule, an expert is needed to establish a case of medical malpractice, since most malpractice cases deal with scientific, technical or specialized knowledge. However, the easily recognizable error of an x-ray technician breaking hip screws by mistakenly placing Mr. Olsen into a frog-leg position is something that does not require expert medical testimony. Granted, it would be *persuasive* to have a physician take the witness stand to echo the following facts gleaned from the witnesses in this case:

a. On March 20, 1991, Dr. Stephen Santora performed a procedure on Travis Olsen known as a Salter pelvic osteotomy, a procedure in which a wedge of bone is inserted into the pelvis to correct an improper angle of the hip (R. 63).

b. During this surgery, Dr. Santora inserted two bone screws to anchor the wedge in place (R. 63).

c. On March 23, 1991, Travis Olsen was x-rayed by technician Dan Offret, an employee of Intermountain Health Care (R. 107; 63).

d. Mr. Offret testified that the proper position for the x-ray ordered by Dr. Santora, an "AP pelvis," would not involve placing the patient in a frog-leg position. (Deposition of Dan Offret, pp. 28-29, R. 107-09.)

e. Mr. Offret does not recall whether he put Travis Olsen in a frog-leg position rather than in an AP position. (Deposition of Dan Offret, p. 30, R. 107-09.)

f. Travis Olsen testified that he was treated roughly, that he screamed in pain, that he told Mr. Offret to stop the procedure, that Mr. Offret responded by saying it was doctor's orders, that "frog-leg position" was mentioned, and that as Mr. Offret grabbed Mr. Olsen's legs and pushed them up and out, Mr. Olsen and his brother heard a crack. (Deposition of Troy Olsen, p. 18, R. 112; deposition of Travis Olsen pp. 13, 28, 31, 32, 41-42, R. 109-112.)

g. The post-operative pelvic x-ray of March 23, 1991, revealed that the screws were dislodged. Thereafter, a plate and two screws were required during a repeat operation to repair the damage. (Deposition of Dr. Santora, pp. 23 and 24; R. 112.)

h. Dr. Santora testified that the dislodging of bone screws probably occurred in x-ray. (Deposition of Dr Santora, pp. 34 and 35; R. 112-114.)

i. Although the Affidavit of Dr. Gary Halversen notes that the osteotomy could have slipped in any number of situations, he also states that it could have slipped during positioning for an x-ray.

j. Even though the osteotomy potentially could have slipped in any number of situations, there is no evidence from the medical records or deposition testimony of any occurrence that could have caused the slippage, except for the acts of the technician at the time of the x-ray, as testified by Travis Olsen and his brother.

A paid expert hired to enumerate the foregoing facts might be useful in meeting a burden of persuasion, but the mere employment of an expert to restate evidence which otherwise is self-sufficient should not be a threshold for a rudimentary non-technical case of malpractice. In this case, Mr. Olsen testified that the x-ray technician roughly pushed his legs into a frog-leg position with Mr. Olsen kicking and screaming in pain, and demanding the technician to stop. The technician continued until the bone screws broke loose. By roughly placing Mr. Olsen in a frog-leg position for an x-ray, rather than in an AP pelvis position, Mr. Offret caused damage to Mr. Olsen. It does not take an expert to establish Mr. Offret's wrongdoing in this case; therefore, the general rule that expert testimony is usually required does not apply to the claims against the x-ray technician.

## POINT II

## IN ANY EVENT, MEDICAL TESTIMONY IS SUFFICIENT TO SUPPORT A CASE OF MEDICAL MALPRACTICE.

The testimony of both Dr. Santora and Mr. Offret further establish a case of medical malpractice. The medical malpractice claim by Mr. Olsen is not against a surgeon, a physician or even a nurse, but rather against an x-ray technician with a two-year degree from Weber State College. During his studies at Weber State, Mr. Offret was taught proper positioning and was trained in patient contact and communication. (Deposition of Dan Offret, pp. 5, 7; R. 114-16.) Mr. Offret was taught that if a patient were to complain during positioning, he was to stop. (*Id.*)

Dr. Santora testified that he understood something happened in x-ray, but he couldn't reach a 100% conclusion. When asked if he had formed a "50% conclusion as to where it likely happened," Dr. Santora stated, "probably in x-ray." Both Dr. Santora and Mr. Offret described the proper method of positioning a patient for an AP Pelvis x-ray -- which is entirely different than the frog-leg position described by Travis Olsen. The combined testimony of Dr. Santora and Mr. Offret about proper positioning procedures and where the incident likely occurred is sufficient to meet the standard for experts giving opinions in terms of possibility, probability or actuality. *See State v. Jarrell*, 608 P.2d 218, 230-231 (Utah 1980).

## POINT III

## TRAVIS OLSEN ESTABLISHED A *PRIMA FACIE* CASE OF BATTERY

Citing the case of *Mims v. Boland*, 110 Georgia App. 477, 138 S.E.2d, 902 (1964), IHC contends that as a matter of law Mr. Olsen did not withdraw his consent for the procedure being performed by Mr. Offret. The court in *Mims* determined that mere protestation of pain was insufficient to withdraw consent. 138 S.E.2d at 908. According to *Mims*, proof of two distinct things is required: (1) the patient must act or use language which can be subject to no other inference except that consent is actually withdrawn; and (2) it must be medically feasible for the provider to desist in the treatment. *See* Appellee's Brief at p. 14, and *Mims*, 138 S.E.2d at 907.

Travis Olsen did more than protest of pain. Mr. Olsen testified:

> I told him to stop. He was hurting me.
>
> . . .
>
> I wanted him to stop and I told him, stop what you're doing, you're hurting me . . . .
>
> . . .
>
> I was pushing forward with my left leg to get him to stop, I couldn't push with my right leg.
>
> . . .

> I said, don't do this, this is hurting me, you need to stop, I'm telling you to stop now.
>
> . . .
>
> I told him not to do it .
>
> . . .
>
> I screamed. You know, at this point, I was bawling. I was screaming, I told him to just stop what he was doing.

(Deposition of Travis Olsen, pp. 31, 32, 33, 41 and 42; R. 109-12.)

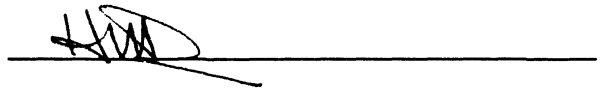
Mr. Offret testified that during the positioning process, he had been trained to discontinue immediately if a patient says that it hurts. (Deposition of Dan Offret, pp. 7-9; R. 114-16.) In this case, the evidence establishes that in spite of Mr. Olsen's complaints of pain, instructions to stop, and his pushing Mr. Offret with his left foot, the x-ray technician continued to roughly and improperly position Mr. Olsen. Such evidence is sufficient to establish a case of battery.

## CONCLUSION

The summary judgment should be reversed and the case remanded for trial on the merits.

DATED this 11th day of September, 1996.

SUITTER AXLAND & HANSON



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## CERTIFICATE OF SERVICE

I hereby certify that I caused to be served two true and correct copies of the foregoing **Reply Brief of Appellant Travis Olsen** by depositing the same in the United States mail, postage prepaid, this 14th day of September, 1996, to the following:

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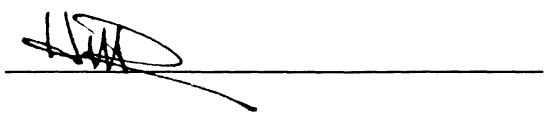

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